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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 513.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor,
Appellant,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

Appeal from the United States District Court for the Eas ern District of Missouri, Eastern Division.

BRIEF

Of Appellant in Opposition to the Motion to Affirm Filed by Certain Appellees.

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Of Appellant in Opposition to the Motion to Affirm Filed by Certain Appellees.

Pursuant to Rule 7, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellant submits its brief in opposition to the Appellees' "Motion to Affirm," which motion was served upon Counsel for appellant on December 24, 1951.

QUESTIONS PRESENTED.

This appeal presents the following substantial questions:

1. Does a finding by the Interstate Commerce Commission that a through route exists over two lines between which there is a physical track connection, but without any other evidence to support its finding, establish the existence of a through route over those lines and over which the Commission may prescribe a through rate?

2. Is a physical track connection between the two lines sufficient in and of itself to establish the existence of a through route over those lines?

3. Does a carrier lose its rights under Section 15 (4) of the Interstate Commerce Act by reason of having complied with the provisions of Section 1 (4) of the same Act which requires it to establish reasonable through routes with other such carriers and just and reasonable rates applicable thereto but short of the destination involved?

4. Does a carrier lose its rights under Section 15 (4) of the Interstate Commerce Act by reason of having complied with Section 3 (4) of the same Act which requires it to afford all reasonable, proper and equal facilities for the interchange of traffic between its line and a connecting line?

5. Does a carrier lose its rights under Section 15 (4) of the Interstate Commerce Act by reason of having complied with Section 6 (1) of the same Act which requires it to file with the Commission and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between points on its own line?

6. Whether the Commission's finding and order are supported by substantial evidence.

PRELIMINARY STATEMENT.

Docket No. 29,461 was instituted by the Interstate Commerce Commission upon complaint filed by the Omaha Grain Exchange of Omaha, Nebr., against Missouri Pacific Railroad Company (Guy A. Thompson, Trustee), and Chicago, Burlington & Quincy Railroad Company.

In the complaint filed it is alleged and contended:

(a) That the rates on grain and grain products, from points on the Missouri Pacific in Kansas (Concordia and west) to Omaha, Nebr. (which includes Council Bluffs, Ia.), were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and subjected complainant to undue prejudice and disadvantage in violation of Section 3 of the Interstate Commerce Act;

(b) That the lines of the Missouri Pacific to Concordia thence Burlington beyond to Omaha afforded a practicable through route as provided in Section 15 of the Interstate Commerce Act.

The Missouri Pacific has a single line route from each of the Kansas origins to Omaha, Nebr. It originates all the grain traffic involved, and is therefore in a position to haul all the grain traffic shipped from those origins to Omaha over its single line route. The question is, must the Missouri Pacific surrender the grain traffic it originates to the Burlington at Concordia, Kans., for the balance of the haul to Omaha, or is the Missouri Pacific's long haul protected under the provisions of Section 15, paragraphs 3 and 4, of the Interstate Commerce Act?

The appellant has contended from the beginning that this is a routing case; that no through route exists over the Missouri Pacific and Burlington via Concordia from the Kansas origins to Omaha; and, before the Commission can prescribe through rates over those lines it would first have to establish a through route over those lines under

the power granted it by Section 15, paragraph 3, of the Interstate Commerce Act but subject to the limitations imposed upon its power by paragraph 4 thereof.

The Commission, reluctant as it is to recognize any limitation upon its power, avoided Section 15, paragraphs 3 and 4, and found that through routes are already in existence at combination rates through Concordia, by way of the Missouri Pacific and the Burlington and that the only relief sought by complainant was reasonable rates, and that it was unnecessary to discuss the provisions of Section 15 (3) and (4), and that those provisions of the act were no bar to the prescription of reasonable rates over such routes, citing **Virginian Ry. v. United States**, 272 U. S. 658, 666.

Appellant would not dispute the right of the Commission to prescribe through rates from the Kansas origins to Omaha over the Missouri Pacific and Burlington via Concordia if through routes existed over those lines.

That brings us to the basic question: Whether a through route existed.

The Commission concluded that it did, but without any substantial evidence to support its finding or conclusion.

The majority opinion of the lower court is:

> "We conclude—evidence of physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route."

That brings us to a discussion of the evidence which the majority lower court opinion says furnished sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route.

ARGUMENT.

1. Does a finding by the Interstate Commerce Commission that a through route exists over two lines between which there is a physical track connection, but without any other evidence to support its finding, establish the existence of a through route over those lines and over which the Commission may prescribe a through rate?

The Commission made no effort to support its finding or conclusion that ". . . .through routes are already in existence . . .." It merely declared that they were and thereby avoided the provisions of Section 15 (3) and (4) of the Interstate Commerce Act, although the Omaha Grain Exchange in the complaint filed with the Commission contended, first, for the prescription of a through route from the Kansas origins to Omaha, Nebr., by way of the Missouri Pacific and Burlington through Concordia on the theory that said lines afforded a practicable through route. And, secondly, the prescription of through rates over the through route thus prescribed. The reason for the Commission's avoidance of the provisions of Section 15 (3) and (4) is apparent. There is no evidence of record to support the existence of a through route over those two lines from the Kansas origins to Omaha except the fact that there is a physical track connection between the two lines at Concordia, Kan. Counsel for the Government admitted in oral argument[1] "that the fact of physical connection alone was not sufficient to establish a through route."

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1 Majority lower court opinion, sheet 4.

2. Is a physical track connection between two lines sufficient in and of itself to establish the existence of a through route over those lines?

In **Western Pacific Railroad Company v. Northwestern Pacific Railroad Company** (1933), 191 I. C. C. 127, 130, 131, the Commission said:

> "Connecting routes do not necessarily constitute through routes over which carriers may be forced to establish joint rates. The rights of connecting carriers afforded by the act must be safeguarded, and in addition the necessity and desirability for the establishment of such through routes must be in the public interest."

The District Court likewise declared:

> "Physical connection of the tracks alone does not **necessarily** mean a through route exists." (Emphasis supplied.)

That statement in the majority Court opinion is not a positive declaration of the law and to that extent has a weakening influence upon the rights preserved to the carriers under Section 15 (4) of the Interstate Commerce Act.

Does "physical connection of the tracks" become a positive and controlling fact when considered in connection with other facts none of which would, when considered alone, support the Commission's finding or conclusion ". . . through routes are already in existence . . ."? In order to properly safeguard the rights of connecting carriers afforded by the Act, and prevent the Commission from hereafter converting what is primarily a routing case into a rate case merely by finding or concluding that through routes are already in existence simply because there is a physical track connection, the Court should declare positively that connecting routes do not constitute

through routes over which carriers may be forced to establish joint rates.

3. **Does a carrier lose its rights under Section 15 (4) of the Interstate Commerce Act by reason of having complied with the provisions of Section 1 (4) of the same Act which requires it to establish reasonable through routes with other such carriers and just and reasonable rates applicable thereto but short of the destination involved?**

The Missouri Pacific has its single line route from each of the Kansas origins to Omaha, Nebr. There is no evidence of record in this case that additional through routes between said points are necessary or desirable in the public interest. The Commission attempts to make no such finding as it would be required to do under Section 15 (3) of the Act.

There are obviously points on the Burlington between Concordia and Omaha which cannot be served by the Missouri Pacific route through Atchison, Kan. Consequently, under Section 1 (4) of the Act, Missouri Pacific was under a duty to establish reasonable through routes upon request therefor from the origin points to Concordia on its line, and from Concordia to points **short** of Omaha on the Burlington. The Missouri Pacific has complied with this duty.

In **Lemon Cove-Woodlake Asso. v. A. T. & S. F. Ry. Co.** (1928), 139 I. C. C. 239, 245, the Commission said:

> ". . . the general provisions of section 1 (4), that carriers shall establish through routes and reasonable rates applicable thereto, are subordinate to the specific provisions of section 15 for establishment of through routes and joint rates."

Surely, it was not the intention of Congress to establish a rule that a carrier's compliance with its duty under

Section 1 (4) of the Act should cause it to lose a right given to it under Section 15 (4). If our premise is correct, and we believe it is, then the fact that there is or may be through routes to destinations on the Burlington short of Omaha does not prove and is not supporting evidence of the finding and conclusion by the Commission that through routes are already in existence from the Kansas origins to Omaha by way of the Missouri Pacific and Burlington through Concordia.

Neither does the publication of class rates in the Kipp tariff[2] alter the situation because Item 330-B thereof specifically provides that the class rates published therein from the points in Kansas here involved on the Missouri Pacific to Omaha apply only over the Missouri Pacific Railroad **direct**. Any class rates published therein from these Kansas origins to destinations on the Burlington via Concordia and **short** of Omaha would not prove the existence of a joint through route to Omaha.

There is published in the same tariff a restriction for the Burlington which is similar to that of the Missouri Pacific. (See Item 250-C.) This item provides, in effect, that the class rates published in the same general territory here involved between any two points located on the Burlington apply **only** over the Burlington direct.

4. Does a carrier lose its rights under Section 15 (4) of the Interstate Commerce Act by reason of having complied with Section 3 (4) of the same Act which requires it to afford all reasonable, proper and equal facilities for the interchange of traffic between its line and a connecting line?

The carriers are required by Section 3 (4) of the Interstate Commerce Act to afford all reasonable, proper and

[2] Western Trunk Lines Freight Tariff No. 231-A, Agent Kipp's I. C. C. No. A-2593.

equal facilities for the interchange of traffic between their respective lines and connecting lines.

The Missouri Pacific and Burlington have complied with provisions of that section of the Act by establishing interchange facilities between their lines at Concordia, Kan., and thereby affording through routes from the Kansas origins involved to destinations on the Burlington **short** of Omaha, Nebr.

Concordia is listed in the Official Register as a point of interchange between the Missouri Pacific and Burlington, but that is not evidence to support the finding of a through route over those two lines via Concordia to Omaha. Since there are admittedly through routes from the Kansas origins involved to destinations on the Burlington **short** of Omaha over the Missouri Pacific and Burlington through Concordia, it is difficult to see how Concordia could be listed otherwise. The listing of Concordia as a point of interchange between the two lines in the Official Register adds nothing by way of proof that a through route exists from said Kansas origins to Omaha by way of the Missouri Pacific and Burlington through Concordia. Neither does the fact that there are physical track connections between the two lines at that point.

5. Does a carrier lose its right under Section 15 (4) of the Interstate Commerce Act by reason of having complied with Section 6 (1) of the same Act, which requires it to file with the Commission and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between points on its own line?

Section 6 (1) of the Interstate Commerce Act requires every common carrier, subject to Part 1 of the Act, to file with the Commission and print and keep open to public inspection schedules showing all the rates, fares, and

charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, ... **when a through route and joint rates have been established.** It will be observed from a reading of Section 6 (1), set out in full in the appendix hereto, that the Missouri Pacific and Burlington are each under a separate duty to file, print and keep open to public inspection all rates and charges for transportation between different points on their respective lines. In the absence of a through route over those lines, neither the Missouri Pacific nor the Burlington is under any duty to publish rates from a point on its lines to a destination on the other line. Neither has the Commission the power to prescribe a through rate over those lines in the absence of a through route. In other words, the Missouri Pacific and Burlington by complying with the provisions of Section 6 (1) do not lose any rights granted to them under Section 15 (4) of the Interstate Commerce Act. Stated in another way, the fact that the Missouri Pacific is required by Section 6 of the Act to publish local rates between these Kansas origins and Concordia, Kans., and the Burlington Railroad is required to publish and maintain local rates between Concordia and all points on its line, including Omaha, is no evidence of the existence of a through route over those two lines between these Kansas origins and Omaha, Nebr., because they are under a duty as required by Section 6 (1) to publish local rates between all points on their respective lines. Neither could the Commission require each of them to reduce their local factors so as to compose a more reasonable through rate **in the absence of a through route over those two lines** from these Kansas origins to Omaha, Nebr.

6. Whether the Commission's finding and order are supported by substantial evidence.

The District Court in an effort to sustain the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route stated:

> "We conclude—evidence of physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route."

We have treated under the five preceding questions the evidentiary basis which the District Court says is sufficient to support the Commission's conclusion. A proper appraisal of the evidentiary basis however discloses that no single bit of evidence taken alone or considered as a whole is sufficient to justify the Commission's conclusion. To conclude otherwise would be to hold that it was the intention of Congress to establish a rule that a carrier's compliance with its duty under Sections 1 (4), 3 (4) and 6 (1) of the Interstate Commerce Act should cause it to lose a right given it under Section 15 (4) of the same Act.

Weaknesses in Appellees' "Motion to Affirm".

The many weaknesses in the appellees' "Motion to Affirm" make clear the lack of merit in their contention.

1. They rely upon appellant's careless choice of words, which appellees contend amounts to an admission, as proof of the existence of a through route. That is as lacking of merit as the unsupported finding and conclusion by the Commission that a through route already exists.

2. They state—

> "In the course of oral argument the appellant admitted that a shipment of grain could be made at the

tariff rate composed of a combination of such local rates."

The record before the District Court does not bear out the above-quoted statement. We quote from the record:

"Judge Sanborn: Suppose you were offered a carload of gain at Lenora to be shipped to Omaha via the Burlington through Concordia. Would that move on through bill of lading, or would it just go to Concordia and then the Burlington take it?

Mr. Ware: It would not move on a through billing. We would not accept a through billing on that shipment from Lenora to Omaha, because there is no through route. Now, it could move this way; it could be billed from Lenora over Missouri Pacific to Concordia in care of the Burlington. We would haul it to Concordia and there we would deliver it to the Burlington, and then it would have to be rebilled over the Burlington to Omaha, Nebraska.

Judge Sanborn: So you accept no carload commodities from Lenora to Omaha via the Burlington on a through bill?

Mr. Ware: We do not. That is right" (Tr. pp. 25-26).

3. They further state in their Motion to Affirm:

"The appellant also admitted before the District Court that the existence of the class rates between the origin and destination points would justify the issuance of a through bill of lading for a shipment over the Concordia route."

The admission by the appellant was that the existence of class rates between the origins and any destinations on the Burlington **short** of Omaha would justify the issuance of a through bill of lading on a shipment over the Concordia route from the Kansas origins to the destinations **short** of Omaha, but not to Omaha. The record is clear on that point and we therefore quote the record:

"Now, Mr. Hickey and Mr. Howell have both referred to Kipp's tariff. Kipp is a publishing agent for these railroads. He publishes these class rates, but I think Mr. Howell made it clear in his argument that those class rates do not apply over the Missouri Pacific and the Burlington to these markets. There is a provision in that class rate tariff which restricts the application of those class rates over the direct line of the Missouri Pacific Railroad.

Judge Sanborn: Now, were those tariffs made any part of the record in this case?

Mr. Ware: I do not recall that they are, if Your Honor please.

Judge Sanborn: How about the right of the Court to take judicial notice?

Mr. Howell: Your Honors can do that.

Mr. Ware: That would be quite all right, yes, sir.

Judge Hulen: I am not sure I understand your position on that.

Mr. Ware: There is a provision in the class rate tariff, if Your Honor please, which restricts the application of those rates except[3] to the Missouri river cities, except[3] over the Missouri Pacific direct. It does not apply—Mr. Howell made it clear, that if they apply short of Omaha, they do not apply to Omaha.

Judge Hulen: Do they apply to other points on the Burlington short of Omaha?

Mr. Ware: They might possibly do that, yes, sir.

Judge Hulen: Well, what would you say if a shipment originated on the north, some station down half way between Concordia and Omaha on the Burlington, would you issue a through bill of lading on that shipment?

Mr. Ware: They might possibly do so, if Your Honor please.

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[3] This statement by Mr. Ware would be clear if the words "except" are deleted.

Judge Hulen: Would you issue a through bill of lading on any point between Concordia, short of Omaha?

Mr. Ware: We might do that, but not Omaha.

Judge Hulen: And that would protect your shipment?

Mr. Ware: That is correct, yes, sir.

Judge Hulen: Well, then, would you admit that there is a through route over these two connecting routes to all points short of Omaha?

Mr. Ware: There might possibly be to some of them, but it would be short of Omaha" (Tr. pp. 66-68).

Since the question here is whether a through route exists by way of the Missouri Pacific and Burlington through Concordia from each of the Kansas origins to Omaha, Nebr., and not to destinations on the Burlington short of Omaha, the proof of the existence of through routes over those two lines through Concordia to destinations short of Omaha, and which the Missouri Pacific was under a duty to establish by reason of the provisions of Section 1 (4) of the Interstate Commerce Act, does not prove the existence of through routes from each of the Kansas origins to Omaha.

Appellees Are Not Left Remediless.

The principle involved in this case is important to every railroad in this country. If the decision of the Commission and the District Court stands it will remove the last vestige of protection which the carriers have in preserving their long haul. The Omaha Grain Exchange, on the other hand, is not so unfortunate. If the Commission had interpreted its complaint as being primarily a routing case and not a rate case and could have on the basis of the evidence before it made the necessary findings required by Section 15 (3) but subject to the limitation imposed upon its power by Section 15 (4), the Omaha Grain Exchange could have

had the same relief which it will have if the appellees' Motion to Affirm is sustained by this Court.

If it is only rate relief which the Omaha Grain Exchange seeks, then the Commission, by its report and that of Division 2, has laid the predicate whereby the Omaha Grain Exchange might secure that relief over the line of the Missouri Pacific direct upon the filing of a proper complaint. It would therefore seem that the equities of the entire situation demand a denial of the appellees' Motion.

CONCLUSION.

The questions raised by this appeal are substantial and important and affect the interests of every railroad in this country. The appellees' Motion to Affirm should be denied.

Respectfully submitted,

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Receipt acknowledged ..... Date .....

....

....

APPENDIX.

Statutes Involved.

Section 15, Paragraphs (3) and (4), Part I, Interstate Commerce Act, 34 Stat. L. 911 (49 U. S. C., Sec. 15), which read as follows:

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to Part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the

entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: **Provided, however,** That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 1, Paragraph 4, Part I, Interstate Commerce Act, 54 Stat. L. 900 [49 U. S. C., Sec. 1 (4)], which reads as follows:

"(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such car-

riers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3, Paragraph 4, Part I, Interstate Commerce Act, 54 Stat. L. 903, 904 [49 U. S. C., Sec. 3 (4)], which reads as follows:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 6, Paragraph 1, Part I, Interstate Commerce Act, 34 Stat. L. 586, 41 Stat. L. 483, 49 Stat. L. 543 [49 U. S. C., Sec. 6 (1)], which reads as follows:

"(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part."